UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DORINA SOKOLOVSKY, Plaintiff, -against- OORAH, INC., ET AL., Defendant.	20-CV-04116 (DG) United States Courthouse Brooklyn, New York Thursday, May 27, 2021 2:00 p.m.

TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING VIA TELEPHONE
BEFORE THE HONORABLE DIANE GUJARATI
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiff:
JAMES, VERNON & WEEKS, P.A.
1626 Lincoln Way
Coeur d'Alene, Idaho 83814
BY: LEANDER LAUREL JAMES, IV, ESQ.

For the Defendants: Oorah Catskills Retreat LLC, Oorah, Inc.,
SEGAL MCCAMBRIDGE SINGER & MAHONEY, LTD.
850 Third Avenue
Suite 1100
New York, New York 10022
BY: CHRISTINE SARA VARGHESE, ESQ.

SEGAL MCCAMBRIDGE SINGER & MAHONEY, LTD.
717 Third Avenue
Suite 2400
New York, New York 10017
BY: CARLA M. VARRIALE-BARKER, ESQ.

For the Defendants: Gittie Sheinkopf, Batsheva Kohn, Marvin Kohn
TWERSKY PLLC
747 Third Avenue
32nd Floor
New York, New York 10017
BY: AARON TWERSKY, ESQ.

(Video teleconference call initiated.)

(Judge DIANE GUJARATI is on the call.)

THE COURTROOM DEPUTY: Civil cause for a motion hearing in Docket Number 20-CV-4116, Sokolovsky versus Oorah, Inc., et al.

Before asking the parties to state the appearances, I would like to note the following:

Persons granted remote access to proceedings are reminded of the general prohibition of photographing, recording and rebroadcasting of court proceedings. Violation of these prohibitions may result in sanctions including removal of court-issued media credentials, restricted entry to future hearings, denial of entry to future hearings or any other sanctions deemed necessary by the court.

Counsel, please state your appearances for the record, starting with the plaintiff.

MR. JAMES: This is Leander James on behalf of the plaintiffs.

Thank you.

THE COURT: Good afternoon.

MS. VARGHESE: Good afternoon.

This is Christine Varghese from Segal McCambridge on behalf of defendants and third-party plaintiff Oorah, Incorporated.

THE COURT: Good afternoon.

MS. VARRIALE-BARKER: You also have Carla Varriale-Barker on behalf of Oorah, along with Ms. Varghese.

Thank you.

THE COURT: Good afternoon.

MR. TWERSKY: Hi, good afternoon.

Aaron Twersky of Twersky, PLLC, 747 Third Avenue, New York, New York 10017 on behalf of defendants Gittie Sheinkopf and third-party defendants Marvin and Batsheva Kohn.

THE COURT: Okay, thank you all.

So, we are convened today for oral argument on, I am going to call them the Oorah defendants but I am talking about Oorah, Inc. and Oorah Catskills Retreat LLC, their motion to dismiss without prejudice or, in the alternative, to further amend.

I will hear the parties out on the argument now and I will ask, I do not know who will argue for the Oorah defendants, Ms. Varghese or one of the other people on the line?

MS. VARRIALE-BARKER: Ms. Varriale-Barker, Your Honor.

THE COURT: Okay, go ahead.

MS. VARRIALE-BARKER: Sure.

Well, we bring this motion seeking dismissal of the third-party action without prejudice. We have outlined the facts and circumstances how this motion came about and we seek

dismissal without prejudice consistent with Second Circuit precedent and meeting all of the Zagano factors, and I will go through each of them for the Court, but briefly there's no legal prejudice, no substantial legal prejudice beyond the prospect of a second lawsuit here.

It was promptly brought, there is no undo vexatiousness on Oorah's part. In fact, we had stipulated a stipulation of dismissal before receiving Mr. Twersky's answer on behalf of the third-party defendant with what we thought was consistent with some things that had been discussed at the last conference.

And we can meet all of the other factors because the suit has not progressed very far at all. There are no duplicative expenses of re-litigation and the need to dismiss, quite frankly, is not because we are treating this as a fishing expedition; we do have some additional facts. In fact, the Court had invited us, if we wanted to, to rest on our prior pleading, but we do have some additional facts.

However, after the pre-motion conference that we had, I think it was the plaintiff's attorney who had actually suggested a third alternative, which would be dismissal without prejudice and, upon consultation, we thought that that might be the most expeditious way to proceed. And I think it is sort of a no-harm no-foul because if the facts that we have started with do not lead to sufficient information to maintain

a third-party action, under Rule 8 we would not be able to bring it. However, we think that we do have facts that appear -- that can support the cause of action as it is now, which is distinguishable from the case that the Kohns rely on, the Rayburn case, but we would like to further develop the record.

And we know that the Kohns themselves have now been identified as witnesses who may have information about the alleged abuse. We know that the abuse occurred, at least in part, in their home. And they are also likely, according to plaintiff's Rule 26 disclosures, to have information about their daughter's interaction with the plaintiff.

So, again, we've developed a record, but we would like the opportunity to weave more strands into the record that we have developed. We meet the factors. I don't think that this is the matter of prejudice to the third-party defendant because there would be no opportunity to revisit if there is not substantial information or substantial facts that can be alleged. In the alternative, we do ask the opportunity to, as the Court had invited us to last time, to further amend, but we thought that this would be, frankly, the most expeditious way to address the issues that had been framed at the last conference.

I note that the third-party defendant doesn't even address some of the Zagano factors in their opposition and

frankly, that's because they cannot, and the most glaring one is the fact that the case has really not progressed. This isn't a situation where somebody's moving for summary judgment or seeking dismissal immediately prior to a full record and summary judgment. We're doing this early on without prejudice for the reasons that we've explained before. And again, given the way that the last conference was when we had discussed these issues, I thought that the stipulation of dismissal, which wasn't objected to when it was suggested, would have been the way to go, but apparently that was not the same thing that third-party defendant had in mind.

And again, I can't emphasize enough the fact that we have not done anything with discovery, and that's a whole separate issue to discuss. The case is no further along and it won't be until this issue is resolved.

THE COURT: Thank you.

Let me hear from Mr. Twersky now, please.

MR. TWERSKY: Hi, good afternoon, Your Honor. Aaron Twersky on behalf of the Kohn third-party defendants.

I -- obviously, our view is completely contrary, right, Your Honor? I mean, our papers are pretty thorough and they're chock full of case law supporting our position. It's nothing more than an attempt to avoid a decision on the merits. That's all that Oorah is trying to do. Oorah knows that. Oorah has done that from the beginning. This case is

not an old case, as Counsel just pointed out. It's not at all. But from the beginning Oorah's main objective as a defendant in the primary action was to bring in the Kohns.

They did that. They brought the Kohns in. I reached out to Counsel and I suggested what Counsel is now trying to do; to withdraw the action. And it was a matter-of-fact no. And they knew that they were looking for an insurance policy. They now know the insurance policy has a client. So now it's a matter of what can we do to string along the Kohns, keep them in this case so we can bring them in; if not now, bring them back in later.

There's no secret, Counsel has written it more than once in their papers, they anticipate doing third-party non-party discovery on the Kohns just to bring them back in. There is not a shred of evidence, as Your Honor knows, we've been before Your Honor at least once on this exact issue. Our motion to dismiss with prejudice is completely ripe, ready to go. The Court knows that. Counsel knows that. So, in an effort to try and avoid a decision on the merits, Oorah now files this motion to dismiss without prejudice so that they can try to string us along so that settlement is harder and this way they keep the Kohns in.

The law is clear. It's not a matter of ripe dismissal without prejudice. We cite ample case law. It's not a matter of right. It's not meant to be used to avoid a

decision that's adverse to a party. It's not meant to be used to avoid decision on the merits. That's exactly what Oorah's trying to do. How do we avoid a decision with prejudice. How do we avoid an adverse decision to us. So, let's dismiss it without prejudice. That's exactly what the case law says it's not meant to do.

Counsel is claiming that's not what they're doing. That's exactly what they're doing. There's no secret, there's no way to sugarcoat it, you can't spin it another way. That's exactly what's going on. They asked to do discovery, that's what they're going to do. That there's no prejudice? I don't know, I mean, I can send Counsel for Oorah my Counsel fees that my client has had to pay. That's prejudice. The case law says it. Legal fees for a case that's now going to be dismissed without prejudice is prejudice. That is substantial prejudice under the law. So saying there's no substantial prejudice is just not true. Case law says if there's substantial prejudice, you can't voluntarily dismiss under Rule 41(a)(2), as far as I'm aware.

THE COURT REPORTER: Excuse me, Counsel, 41(a)?

THE COURT: I am sorry, who is speaking?

THE COURT REPORTER: I apologize, Your Honor, this is Court Reporter Victoria Butler.

THE COURT: You were overlapping, I could not tell who was speaking.

Mr. Twersky, are you done or do you have more to say?

MR. TWERSKY: No, I have more to say.

THE COURT: Go ahead.

MR. TWERSKY: I think the court reporter wants to know Rule 41(a)(2), which is what Counsel for plaintiff is moving under now.

THE COURT: I am sorry, I did not realize it was the court reporter.

Yes, please feel free to interrupt if you need any clarification or if we are going too fast. I am sorry, I did not realize who was speaking.

THE COURT REPORTER: Thank you.

MR. TWERSKY: I apologize -- Aaron Twersky again -- if I'm speaking too fast for the court reporter.

That's our argument, Your Honor. The case law under D'Alto versus California talks about substantial prejudice. This is substantial package.

Your Honor, as far as the Zagano factors. Counsel has mentioned it, it's clear. It's overwhelming in this District as well as in the Second Circuit, the five factors. The five factors weigh heavily in favor of denying Oorah's motion to dismiss without prejudice.

The first one is diligence in bringing the motion to dismiss without prejudice. There's no secret here. We sent

an email, we had a conference by phone with Counsel for Oorah three quarters of a year ago, a month after we were brought in, from the outset. They knew from the outset they had not a shred connecting us. They have made us, from the outset and we've attached, Your Honor, we've cited it in our memo, we laid out clearly under all the law, contribution and notification for a third-party defendant, you can't survive a motion to dismiss. Withdraw the action. We even agreed to a tolling agreement. They would not hear of it. They wanted that insurance policy from Allstate, which was denied in the end but they wanted it in. And we begged them and they refused.

And now we've held their hand to the fire. We've pushed them to the wall. And the Court did it, Your Honor; not me, Your Honor did it. We filed a pre-motion letter to dismiss with prejudice, and they amended, and then the Court gave them a second chance to amend. Now Counsel's saying, well, they just thought this would be more convenient. That's not what happened. They waited until the very last second and they didn't file the motion to amend and then, we're now finding ourselves where now they're claiming they want to amend.

Frankly, Your Honor, I almost encourage the Court to not grant the motion to dismiss without prejudice and allow them to amend. What are they going to do in this magical

second amendment that they already waived in there last time? Nothing. They have nothing that they want to bring in. They can't allege anything. Why? Because there is nothing. There was no notice under the law. We should be dismissed with prejudice.

Frankly, the plaintiff has admitted it already. We cited it in our post papers all over the internet where there was a video of the plaintiff saying that we had no notice and they are innocent, the Kohns knew nothing about anything in their allegations. So now plaintiff is going to magically -- now plaintiff says they're going to add facts. What facts? What facts do they have? Plaintiff has -- she herself has said that my clients are innocent.

So, going back to the Zagano factors, Your Honor. Was this done with diligence? Of course it was not done with diligence. This should have been done already a year ago, almost a year ago when this was first filed. And it hasn't. We've done pre-motion letters, we've been in front of Your Honor, we've had conferences, we had to file an opposition. What's diligent about that? My client spent tens of thousands of dollars. That's not diligence. The case law says that's not diligence and because of that, Your Honor, the Zagano factor is in favor of them not being allowed to file -- the first factors not -- will not allow them to file.

The same thing, Your Honor, for the second factor.

The second factor relating to vexatiousness. It's overwhelmingly clear this is vexatious. All they're doing is avoiding an adverse decision.

Adverse decision avoidance is not ample support to file the motion to dismiss without prejudice. They filed their own motion to dismiss in order to avoid the merits-based decision. That's all this is. Case law says it very clear. Exactly like Your Honor, we cited a case called Heyliger v. Cymbrak. Waiting to seek a dismissal until after it became clear that the claims have no merit is considered vexatious. That's what this is. This is vexatious litigation just trying to bring in a party that has no connection so that it makes it more -- it makes easier for them to settle when they know there's no claim. So, it's vexatious, it wasn't done with diligence, and that factor as well weighs in favor of them not being allowed to file it.

Your Honor, we ask that that be held -- that if somehow they be allowed to file it, that there be some sort of Protective Order not to allow for third-party non-party discovery against the Kohns. There's no reason at all why there should be any discovery relating to the Kohns if the matter continues. This matter is by plaintiff against the defendants. Plaintiff doesn't need discovery relating to whether the Kohns knew. They don't bring a claim and they've already admitted, they have direct admission, that they knew

nothing about it.

And so the factors, the primary two first factors including the fifth factor, their explanations for the dismissal is -- all they say is a dismissal without prejudice is reasonable. Why is it reasonable? It's reasonable for them. It's not reasonable for my client. My client's already been in this matter for a year paying extensive legal fees for no reason and now they have to deal with, potentially, the declaratory judgment action against their insurance company.

And so, Your Honor, we ask that their motion be denied and we be allowed to move to dismiss with prejudice. But, we note in our second point in our memo letter that if the Court somehow grants the Kohns' release, the Oorah's release to dismiss without prejudice, that we be entitled to attorneys fees and legal fees. We cite case law after case law that attorneys fees incurred in defending an action like this is reasonable, right. The rules say it. FRP says it. The Courts have said the Court may dismiss it without prejudice on the terms that the Court considers proper and ample case law says legal fees for up to this point is not unreasonable.

And so, we ask Your Honor for that as well. Because if -- we cite a case called Colombrito v. Kelly. The case there says the purpose of such award is generally to reimburse the defendant for the litigation costs incurred in view of the

risk faced by the defendants that the same suit will be refiled and will pose duplicative expenses upon it.

Somehow, if Your Honor thinks it's appropriate it should be dismissed without prejudice, well then attorneys fees is for sure ample. Oorah has admitted they plan on doing nonparty discovery against the Kohns. It's not a secret. They've said it. They've asked for it. Well then, all they're doing that for is to bring -- re-file their complaint, third-party complaint. Well then, we ask for attorneys fees up to this point. Not unreasonable. We also ask, Your Honor, we'd also ask for a Protective Order that we mentioned. And other than that, Your Honor, I think that we rest on our papers. I think our papers are pretty clear.

THE COURT: Thank you, Mr. Twersky.

Let me turn back to Ms. Varriale-Barker for any response.

MS. VARRIALE-BARKER: Yes, Your Honor.

I have a lot to respond to, but let me try to keep it circumspect.

With regard to this business about bringing in or not being able to do any non-party discovery with the Kohns, I think that Mr. Twersky overlooks the fact, and we've annexed it to our papers, that the plaintiff has identified the Kohns as Rule 26 witnesses indicating that some of the abuse happened in the home and that they may have witnessed -- and

it's beyond the abuse. The interactions between their daughter and the plaintiff. So, that's not coming from me, although it is a basis to conduct non-party discovery and why it's not exactly correct to say that there is no evidence that the Kohns were aware of or have information relating to the alleged abuse or the interactions between their daughter, who the plaintiff has described as a sexual predator, and the plaintiff.

The video that the plaintiff -- we had alluded to this in our last conference with the Court. There is a video where the plaintiff says, and this is would be the subject to the amendment, that she is to come downstairs -- meaning Mrs. Kohn -- and check up on them, and check on them in the middle of the night, and that the plaintiff had wished that they would catch us because that was her only way out. They had pushed the beds together. We know from plaintiff's most recent discovery that there were episodes or at least one episode where the plaintiff was bleeding at the Kohns' house. We know that they were using personal email, not camp email, to communicate.

I mean, there is enough there. This isn't something like an open-and-shut case that the Kohns had nothing to do with this. There is enough there and it is distinguishable from the cases that have been cited by the Kohns that it merits the discovery that we're talking about.

In terms of duplicative or unnecessary litigation again, we have had the barest of discovery. The plaintiff and Oorah have provided more fulsome Rule 26. We have just an insurance policy from the Kohns and Ms. Sheinkopf, which is a separate issue, but thousands and thousands of dollars in legal fees would surprise me and are not supported in the papers. And the Second Circuit had consistently recognized that starting a litigation over again doesn't constitute legal prejudice and here, we're barely out of the gate to start off with.

I have a different recollection of the conversations that Mr. Twersky has alluded to and I don't think that his version makes much sense when you think about the fact that we had talked about dismissal without prejudice at the pre-motion hearing as one of the options, the second being further amendment versus resting on one's pleadings. Nobody objected. We sent the stipulation and in response we got: I'm not in the office. And then, an answer within moments. And we've laid that out in our papers. I think it's incredibly off-base to claim that we are somehow being vexatious and, at the same time, seek costs and sanctions as -- or attorneys fees as a result of the same, given the behavior that we've demonstrated.

We can meet the Zagano factors. The Kohns don't even bother to address several of them because they're not in

their favor, quite frankly. I think that the situation is such that dismissal without prejudice at this stage of the litigation makes sense, protects everyone's interests and again, there's no harm to the Kohns if there really aren't further additional facts.

THE COURT: Thank you.

MS. VARRIALE-BARKER: But I think that there will be.

THE COURT: Thank you, that is helpful.

I want to go back to something that you had said earlier when you first addressed the Court about the status of discovery.

MS. VARRIALE-BARKER: Yes.

THE COURT: Could you just confirm for me that there have been no depositions yet in this matter.

MS. VARRIALE-BARKER: Oh, not at all. Not of anyone. We're still seeking discovery.

THE COURT: So, at this point there has been the exchange of the initial disclosures.

Anything else?

MR. TWERSKY: No. We are trying to get authorizations, which is a separate issue. We have been told that we need to execute a confidentiality agreement, which we have done. However, neither Ms. Sheinkopf, nor the third-party defendant, was willing to execute the agreement

until after this motion was decided. So, I don't even have authorizations at this point.

THE COURT: I am going to turn to you, Mr. Twersky, because I would like to ask the same question to confirm that there have be no depositions and that we are at the stage of initial disclosures only.

Has anything else happened on the discovery side of this as far as you are aware?

MR. TWERSKY: No, Your Honor, as far as I'm aware the discovery -- there was just an exchange of initial disclosures.

Counsel just noted there was an exchange of a draft of a confidentiality agreement. I haven't had a chance to review it. One of my associates is on maternity leave earlier than expected so I'm a little short-staffed and just brought in a new associate to join me on this case. So, we anticipated that I would review it and then we'd go from there. That's just relating to discovery. There's been no depositions and in terms of discovery, it's early on in the case.

If I may, Your Honor, just to reply quickly to some of --

THE COURT: I would like to ask you a couple of questions first and then I will give you a chance to reply.

MR. TWERSKY: Sure.

THE COURT: You heard your adversary discuss that the Kohns were first invoked or involved in this case when plaintiff listed them as witnesses in her initial disclosure.

Is that accurate?

MR. TWERSKY: I don't think that's accurate at all, Your Honor, actually. That's completely not accurate. The way this worked was, this case was filed -- and I can look up the exact dates, I don't have it in front of me, but -- soon thereafter was removed. I think it was even, and Ms. Varriale-Barker can comment on this and I may be misquoting it, but not intentionally -- this was filed in State Court and then removed to Federal Court by Oorah. And I believe even prior to it being removed to Federal Court, my clients were brought in as third-party defendants -- oh, so then it was right afterwards. It was soon after removal to Federal Court that the third-party complaint as filed.

There's no misquoting, you know, what's on paper. I have an email that I attached and I've cited it in our memo. It says very clearly I reached out to Counsel for Oorah to not have to go through a year of litigation like this for nothing. And no one was willing to withdraw it. We were willing to withdraw without prejudice and enter a tolling agreement because this relates to the Child Victims Act and they understood there was a statute of limitations. Oorah was not interested. They would not hear of it. And so then we played

this out.

So, back to answer Your Honor's question, that's not at all what happened. Later on, more recently, after initial disclosures, in a very boilerplate initial disclosure by plaintiff, even though plaintiff has already admitted publicly that, and I quote, that they are innocent people, referring to my clients the Kohns, a list of potential witnesses, not one of them are the Kohns. Not that they think actually there is something there. Counsel is using that to hang their whole hat on to claim that obviously there is something there, even though that is the first time I've ever heard that ever.

I would ask, frankly, ask the plaintiffs directly on this call. Do they actually believe that there's something there? I don't think so. I think that's probably just a list of twenty potential witnesses, like everyone always done in initial disclosures, anyone that's potential, of course, potentially anyone is there. But that wasn't the first time that my clients came into this case, they were brought in well before those initial disclosures happened.

THE COURT: Let me turn back to Ms. Varriale-Barker on this specific point because I do want to make sure that the timing is clear.

MS. VARRIALE-BARKER: Yes.

And the timing of what aspect; when the third-party action was started?

THE COURT: Not when the third-party action was started necessarily, but when were the Kohns first either mentioned in any of the documents, any of the discovery proceedings. When were they first, essentially, invoked as potential witnesses?

MS. VARRIALE-BARKER: She mentions them in some of her social media posts that we reviewed as part of our initial investigation. The confirmation or the solidification really came from the investigation and then, from plaintiff's Rule 26. And I want to emphasize that, as I understand plaintiff's pleading, it's the sexual abuse, but also that there was a, an -- how to best describe it -- an abusive or obsessive, inappropriate relationship between Ms. Kohn and the plaintiff. And I think that is what is mentioned in the Rule 26; that they may have knowledge about the nature of that relationship.

And it's similar to the claims, quite frankly, that have been made about Oorah personnel; that they were on notice or should have observed the very same behavior.

THE COURT: Which came first in time, the third-party complaint or plaintiff's Rule 26 disclosure in which the Kohns were mentioned?

MR. TWERSKY: Third-party complaint. Well in advance of that, Your Honor.

MS. VARRIALE-BARKER: I don't know that. I don't

know about well in advance, but yes.

THE COURT: Ms. Varriale-Barker, just go ahead.

MS. VARRIALE-BARKER: I think that Aaron actually has it up, the initial third-party action, the date that it was filed predates the Rule 26, of course.

MR. TWERSKY: The Rule 26, Your Honor -- Aaron Twersky.

The Rule 26, I think, was filed February 21st -- 24th, 2021. I mean, the amended complaint was filed after that, but the first complaint was filed several months -- right after the initial complaint was filed.

THE COURT: Yes, thank you. I just wanted to make sure that the timing was clear to all here.

Mr. Twersky, you have raised in your papers the suggestion that the Oorah defendants are going to be abusing the discovery process to engage in what you are calling a fishing expedition.

What is your basis for claiming that? Is there any anything that has already occurred in this case that leads you to conclude that?

MR. TWERSKY: They wrote it in their papers that they anticipate doing discovery on my clients. They're not denying it now. Ms. Varriale-Barker is not going to deny that now. She knows she --

THE COURT: Let me stop you there for a moment.

What you are claiming is that it is going to be a fishing expedition, which is a very different nature than simple discovery; is that right?

MR. TWERSKY: Your Honor, a fishing expedition in the sense that there has been a direct admission by plaintiff that my clients didn't know anything about it. They have not been included in plaintiff's initial complaint. We have moved to dismiss with prejudice and they took no position and had no issue with it. And now, plaintiff's -- third-party Oorah's now trying to do it without prejudice and have admitted that they anticipate doing discovery to, quote, develop the record.

So, when you develop a record that there is none of, and you've spent a lot of legal fees to do that on behalf of the Kohns I'm referring to, Your Honor, so the fishing expedition would be taking depositions. We've all been at depositions, Your Honor, where if you would, you know, extract from one sentence, you can try to weave a tale that doesn't exist. Plaintiff has made a direct admission they knew nothing about it.

Ms. Varriale-Barker keeps quoting the same thing over. She did it last conference, she's doing it now repeatedly about how they wish the mother came down -- wishing does not give notice. The plaintiff directly said, I quote it in our papers, she literally said outright. She said they are innocent people. They are lovely people. I have quoted. I

can quote it for you now, Your Honor. So, to now create a fact pattern that doesn't exist is going to be going on a fishing expedition. Trying to depose people that are not relevant.

THE COURT: Thank you, Mr. Twersky.

Let me turn now, I know Mr. James, this was not your motion, but I do have a question for Mr. James.

Are you still on the line?

MR. JAMES: I am, Your Honor, and I do have, I think, what may be some important points to make.

THE COURT: Okay.

Let me just ask you one question and then you can make whichever points you want to bring to my attention about the status of discovery, what has taken place and what hasn't taken place.

Could you let me know?

MR. JAMES: Prior to filing suit, plaintiff provided a, essentially, almost a Rule 26 disclosure, which provided a great deal of information to Oorah defendants. Then we ended up filing suit and then engaged in our Rule 26 disclosures.

The discovery has been roadblocked, I think, by this issue before the Court and if the Court would like, and I would like to expound a little bit on that.

THE COURT: Sure.

MR. JAMES: Okay.

The problem here, in the context of this motion to amend and motion to dismiss the third-party complaint, in one of the filings defendant Oorah uploaded a great deal of confidential and, I would argue, privileged information of my client's medical records and sensitive information into the docket. I immediately alerted Oorah's Counsel to that issue and I believe within, you know, an hour or so those records were pulled off the -- pulled out of the file. The Court file.

Because of that, my client is very sensitive to being sure we have a confidentiality agreement that prevents that sort of thing from occurring again. I thought we already had one, but just to be sure, I'm trying to get one in writing. I have exchanged a number of drafts with Oorah's Counsel and we have both signed it and the co-counsel has not signed it. And I'm not casting any stones here, I truly am not. I understand the position they're taking that they don't want to sign that and get into discovery when the Kohns will be, they believe, dismissed. So, that has been part of the roadblock in discovery. We need to get that agreement signed so that we can start exchanging the sensitive material.

I know Oorah has sensitive material, too. Confidential material. I shouldn't say I know, I highly suspect they do. So, we need to get that signed so we can get discovery going. And that, I think, is leaving some prejudice

that I will explain in my argument here in a minute to plaintiff and all parties.

THE COURT: Thank you, that is helpful, go ahead.

MR. JAMES: Okay.

Your Honor, let me start with a solution to the problem. I think there are two solutions to the problem in front of the Court and I think the Court, on the record, has the power to exercise either one.

The first is what the Kohn defendants are requesting and that would be dismissal of the cross-claim with prejudice.

The second is to allow Oorah defendants to amend their complaint, third-party complaint again, and then hear another motion to dismiss on that, and make a ruling on that. And there's a timing issue. And I want to invite the Court to focus on this timing issue.

There is a growing prejudice now for the plaintiff. The growing prejudice is driven by the deadline of the window for the Child Sexual Abuse Act. I am very familiar with that act, I helped draft it, in fact, and actually assist in that. The deadline is August 13th, effectively. There's reference to the 14th, but it's really August 13th, I think at midnight, is the deadline for my client to amend the complaint if she's going to, to bring in the Kohns.

Plaintiff has been sitting on the sideline throughout this argument between the Oorah and the Kohns

trying to see where the Court lands on this. If the Court dismisses the third-party complaint with prejudice, then plaintiff can proceed forward without the concern that later on they will be brought back into the case and particularly, if it's after the window closes, then the plaintiff can't bring a claim against the Kohns, and there is an empty-chair trial where fault will be dumped on the empty chair and my client, the plaintiff, receives no recovery for that fault.

The prejudice I am trying to highlight is if this issue is not resolved one way or the other in advance of August 13th such that the plaintiff can't exercise her right to bring a claim against the Kohns if the Court decides the facts of law sustain a claim, then my client will be materially prejudiced. My client -- and I think all parties, honestly -- are being materially prejudiced at this point with discovery because we're not able to get the written discovery we need and disclosures we need arguably to get into depositions.

I think if I -- I will tell the Court I have not asked for a deposition, but I think if I asked Mr. Twersky for the deposition of his clients, I think I might run into reluctance. I don't want to speak for him, but I think his position has been pretty clear that he wants this issue resolved before expense, time, energy and his clients' money engaging in discovery.

So, to crystallize my argument. The plaintiff and I would argue all parties are being prejudiced by the delay in discovery that's been caused by this issue still percolating, the issue being whether the cross-claim will be sustained or not or dismissed with prejudice. The prejudice to my client that's growing daily is the looming deadline of August 13th where if the Kohns are in the case -- and I have been candid with Counsel on this, I have told them, I intend to bring a claim against the Kohns if the Court decides there is sufficient evidence to sustain a claim. I have to, because I have to protect my client from the empty chair at trial. I can't let the 13th pass without making decision on that. So, the second solution of allowing Oorah to amend and then hearing another motion to dismiss, the Court, I think, has the power to exercise.

I would urge the Court to put time limits on that, if the Court goes that direction, such that that motion is heard well in advance of August 15th of this year so I know whether or not I need to protect my client by bringing a claim against the Kohns. If they're out, they're out with prejudice for everybody, then fine. They're out with prejudice for everybody, I don't have to worry about that. But if they're in, then I've got to worry about that.

And if they're in, there's also another sort of, I think, if I understand my procedure right here and where

people live and reside, there's another looming issue because if I amend to bring in the Kohns as co-defendants, then that destroys diversity and this case goes back to State Court, I think. But that's another issue for another day.

So, in summary, Your Honor, I would ask that the Court either dismiss with prejudice so that we know the Kohns are out, they're out for good, I don't have to worry about that for my client. Or, if the Court decides the more prudent approach is to allow an amendment with Mr. Twersky surely going to bring another motion to dismiss, then -- I should have pointed this out, Your Honor, I wrote this down -- Oorah's Counsel said: We do have the facts to support the cause of action now.

They have the facts to support it now, so if the Court allows them to amend, they will bring those facts into the claim, the cross-claim, and then, it should be heard well in advance of the 13th so that we know whether the Kohns are in this case or out with prejudice, but which will dictate what action I take. Or don't take.

And with that, I will answer any of the Court's questions.

THE COURT: Thank you, that is helpful, thank you Mr. James.

I do not have any more questions. I appreciate the arguments of all the parties and the briefing as well and I

will reserve decision on the Oorah defendants' motion.

MR. TWERSKY: Your Honor, if I may, it's Aaron Twersky.

THE COURT: Yes, Mr. Twersky.

MR. TWERSKY: Just briefly, if I may, just to speak to Mr. James' point right now. Just to buttress his point.

I understand his prejudice argument and we've -- I'm not going to say we consent, but we'd be more than happy, Your Honor, if the Court denies the first element, the first prong of their motion and grants the Oorah defendants like Mr. James just said, the Oorah Counsel has said repeatedly they have facts, they have facts, they have facts. So if they have facts, let them have a third chance to amend and we will follow Your Honor's court rules. We'll file a pre-motion letter, if we think it's appropriate and we'll go from there.

THE COURT: Right. I think you said this earlier and I have your position. Thank you, Mr. Twersky, I understand your position well.

I will reserve decision and the decision will issue in due course.

Thank you, everyone, we are adjourned.

ALL: Thank you, Your Honor.

(Matter concluded.)

oooOooo

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.
/s/ Victoria A. Torres Butler June 4, 2021